2002. The Commission finds no reason why Verizon cannot offer the same arrangement to CLECs at the outset of the parties relationship in order to facilitate the CLECs market entry, a primary goal of the TCA. It is evident that Verizon never offered NCC such an option.

555 SERVICE

27. A customer of NCC with a 555 number approached NCC about getting service for his number. When NCC contacted Verizon , Verizon initially agreed to transport the calls and route them to NCC; but the next day reneged, claiming it was technically infeasible due to translation problems with the routing of the calls. In addition, Verizon informed NCC of a policy that it had which treated all 555 traffic as access call, for which NCC would have to pay access fees to get the calls routed to it. NCC Ex. 1, pp. 14-16; NCC Ex. 3-C-032; NCC Ex. 5, p. 21.

28. Section 15.1 (a) (3, 4) of the Rules and Regulations for Government of Telephone Utilities, 150 WVCSR Series 6 ("Telephone Rules"). requires all local exchange carriers to provide dialing parity to competing local exchange carriers and permit ail competing local exchange carriers to have nondiscriminatory access to telephone numbers.

29. The ATIS guidelines indicate that 555 numbers may be treated as local calls or access calls. The choice in this matter resides with this Commission. NCC Ex. 3-N: NCC Ex. 5, p. 23; NCC Ex 6, pp. 4-5.

30. Verizon advertises an "Enhanced ISDN-PRI Hubbing Service on its web site. NCC Ex. 5, p. 24. With this service, Verizon can offer one LATA-wide number to Internet service providers using 555 numbers. Callers will only be charged for local calls. Since Verizon is attempting to sell a retail service using 555 numbers it cannot deny an equivalent use for competing 555 numbers provided by CLECs.

31. By refusing to route calls as local calls to CLECs and forcing CLECs to pay access if they want their customers to receive these calls, Verizon is provisioning this service in a discriminatory fashion. If CLECs are compelled to pay access, it will be impossible for them be competitive with Verizon on the same service.

32. When Verizon defined the service as local, they effectively defined it as local for all competitors. NCC Ex. 5, p. 25; NCC Ex. 6, p. 4. By approving this product as local, the Commission should do the same for all carriers, or prohibit Verizon from charging message units, as access services cannot charge message units. This is the

only way to ensure nondiscriminatory treatment. Verizon's offer to allow North County to "purchase" the service from Verizon and re-sell it is not a legitimate option, as in such a circumstance, North County would have no chance of competing on an equal footing

33. If the Commission found 555 service was access, this would compel NCC to obtain NXX codes in every central office. It is most unlikely that NCC would succeed in such a venture, because numbers are assigned by lottery and NCC has no guarantee that it would receive the necessary codes. Tr., Vol. I, 96. Even if NCC were successful, the eventual result would be an area code split, a result undesirable to all, most of all to West Virginia consumers. Id. Finally, this is of no use to ISP customers who want to use a single number throughout the LATA.

34. The interconnection agreement appears to be silent on the particular question of 555 numbers but it does define what non-geographic means:

> ". . . typically associated with a specialized communications service which may be provided across multiple geographic NPA areas; 500, 800, 900, 700, and 888 are examples of non-geographic NPAs."

35. The Commission finds no mention is made of 555 being non-geographic and thus elects to treat 555 calls as local calls subject to the ICA.

36. In addition, treating 555 numbers as local calls would give consumers 7-digit dialing which typically they prefer.

TARIFF-BASED DETERMINATIONS

37. In the Third Count of its Complaint, NCC alleges that the Commission should declare Verizon's acts to be illegal. Thereafter, it is NCC's intent to seek damages in circuit court, pursuant to West Virginia Code § 24-4-7.

38. The Commission has no statutory authority to award damages or attorneys' fees. However, the Commission does have authority under § 24-2-7 to make orders as are just and reasonable. In addition to interpreting tariffs and ICAs which the Commission has approved, the Commission's powers include general oversight of the telecommunications industry in West Virginia.

39. Section 12 *of* the ICA provides for liability in the event of willful or intentional misconduct, including gross negligence. Verizon's West Virginia Tariff No.

201 likewise provides for liability in the event of gross negligence, 'willful neglect or willful misconduct.

40. The Commission finds that it has authority to make such a determination. The Cornmission, possesses only those powers expressly delegated to it by statute, or incidental to those express powers, together with those required by necessary implication to enable it to fulfill its statutory mandate. The Commission possesses general supervisory power and broad investigative and oversight authority. Inasmuch as interpretation of tariffs falls within this Commission's particular expertise, we find that a determination as to the existence or absence *of* gross negligence or willful misconduct would be of assistance to the circuit court, in addition to falling within our general powers.

41. Findings of gross negligence and willful misconduct do not relate solely to the issue of liability for damages, but are properly made in the context of this Commission's power to review complaints regarding a regulated utility's service, conduct and tariff-based charges, as well as its general oversight and regulation *of* the industry.

42. In this case, Verizon attributed delays *to* the alleged investigation of non-issues; failed to have plausible explanations, or any explanations at all, for large blocks of time, delayed filing the ICA with no plausible explanation; produced witnesses who were unfamiliar with the transaction or the appropriate expertise; failed to provide witnesses with personal knowledge of the facts; developed a policy which violated the Telecommunications Act, the interconnection agreement, FCC regulations and long-standing FCC orders, Commission Rules, and ultimately § 24-2-7 *of* the West Virsinia Code; attributed its position to large volumes of CLEC traffic when it did not have the information to support such a conclusion; waited until NCC was on the verge of losing its NXX codes before offering an alternative arrangement; and never informed NCC *of* the "alternative arrangement" exception to the policy or the existence of the alleged case-by case policy.

43. Verizon did not demonstrate any concern for the consequences of its conduct, engaging in gross negligence/willful misconduct, defined as "conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing." A finding of gross negligence and willful misconduct is only fair and appropriate.

44. Under West Virginia law, absent statutory or contractual provision, each party bears his own attorneys' fees. However, there is authority in equity to award to the prevailing litigant his or her reasonable attorneys' fees as costs, without express statutory authorization, when the losing party has acted in bad faith, vexatiously,

wantonly, or for oppressive reasons. Midkiff v. Huntington National Bank West Virginia, 204 W. Va.. 18, 511 S.E.2d 129 (1998). The Ccmmission finds there is sufficient similarity between the concepts of gross negligence and willful misconduct which pertain to a liability determination under the tariff and ICA. and those of bad faith, vexatiousness. wantonness, or oppression which relate to attorneys' fees as an element of damages to justify making the requisite finding in this instance.

45. Moreover, the Commission finds that Verizon's bad faith, vexatiousness, wantonness, or oppression in this instance was not merely limited to the transactions between the parties, but also related to the conduct of the litigation, as well. These findings are based upon (a) defense counsel's request, in his very first correspondence to the Commission, that NCC's out-of-state counsel stipulate that they will behave civilly, when there was no cause to suspect counsel would behave otherwise; (b) spurious objections *to* discovery which led to multiple motions to compel being granted *in toto;* (c) making post-hearing filings which were not requested; (d) failing to consent to the deposition of Charles Barthalomew, a Verizon employee, failing to submit prefiled testimony from Mr. Barthalomew or have him appear at hearing, and then filing a post-hearing affidavit from Mr. Barthalomew; and (e) pre-filing direct and rebuttal testimony of Dianne McKernan, after opposing her deposition, which omitted key testimony on the origins of the Verizon "policy" at issue in an effort to sandbag North County in this proceeding.

CONCLUSIONS OF LAW

1. This proceeding has been conducted pursuant to West Virginia Code § 24-2-7 (a) for the purposes of resolving NCC's complaint against Verizon West Virginia, Inc. West Virginia Code § 24-2-7 (a) provides that

> Whenever, under the provisions of this chapter, the commission shall find any regulations, measurements, practices, acts or services to be unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of any provisions of this chapter, or shall find that any services which is demanded cannot be reasonably obtained, the commission shall determine and declare, and by order fix reasonable measurements, regulations, acts, practices or *services* to be furnished, imposed, observed and followed in the state in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory, inadequate or otherwise in violation of this

chapter, and shall make such other order respecting the same as shall be just and reasonable.

2. The Telecommunications Act of 1996 ("TCA") was enacted, among other purposes. to introduce competition into the local exchange telephone market. One of the major provisions of the TCA required ILECs to interconnect their networks with those of CLECs at any technically feasible point in their network that is equal in quality to that which the ILEC provides itself, a subsidiary an affiliate, or any other party on terms and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251 (c) (2).

3. In order to implement the interconnection process, the Federal Communications Commission enacted 47 C.F.R. § 51.305, which provides as follows:

> (a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:
>
> (1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;
>
> (2) At any technically feasible point within the incumbent LEC's network including, at a minimum:
>
> (i) The line-side of a local switch;
>
> (ii) The trunk-side of a local switch;
>
> (iii) The trunk interconnection points for a tandem switch;
>
> (iv) Central office cross-connect points;
>
> (v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and
>
> (vi) The points of access to unbundled network elements as described in Sec. 51.319;
>
> (3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party, except as provided in paragraph **(4)** of this section. At a minimum, this requires

(4) That, if so requested by a telecommunications carrier and to the extent technically feasible, is superior in quality to that provided by the incumbent LEC to itself or to any subsidiary affiliate, or any other party to which the incumbent LEC provides interconnection. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier; and

(5) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchanye traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) *of* the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level *of* quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

(g) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.

4. In order to implement the pro-competitive goals of the Telecommunications Act of 1996 within West Virginia, this Commission enacted section 15.2(a) of the Rules and Regulations for the Government of Telephone Utilities, 150 WVCSR Series 6 ("Telephone Rules"), which provides that

> Each incumbent local exchange carrier shall provide for interconnection between the facilities and equipment of any requesting telecommunications carrier and the incumbent's network:
>
> 1. For the transmission and routing of telephone exchange service and exchange access;
>
> 2. At any technically feasible point within the incumbent's network;
>
> 3 That is at least equal in quality to that provided by the incumbent to itself or to any subsidiary or affiliate to which the incumbent provides interconnection; and
>
> **4.** On rates, terms, and conditions that are just, reasonable, and non-discriminatory, in accordance with the terms and conditions of the carriers' interconnection agreement and the requirements of
> § 150-6-15.2 and 15.4.a.

5. In addition, Telephone Rule 15.1 (a) (3, 4) requires all local exchange carriers *to* provide dialing parity to competing local exchange carriers and permit all competing local exchange carriers to have nondiscriminatory access to telephone numbers. Similarly, see *47* CFR § 51.217(a)(2), (c)(1).

6. Verizon's delay in processing NCC's request to opt into the ICA and Verizon's delay in filing the petition for approval with the Commission, *as* described in Findings of Fact Nos. 3-7, violated its duty to negotiate and implement interconnection agreements in good faith under 47 U.S.C. Section 251(c)(1) of the 1996 Telecommunications Act ("TCA"), and constitutes an unjust, unreasonable, insufficient

and unjustly discriminatory practice, and a failure to provide services in a reasonable manner, in violation of West Virginia Code § 24-2-7.

7. Verizon's policy and practice of only interconnecting with CLECs at separate dedicated Inter Office Facilities, as described in Findings of Fact Nos. 11-26 violates West Virginia Code § 24-2-7 in that it is a practice, act or service which is unjust, unreasonable, insufficient or unjustly discriminatory, to wit : (1) it is "technically feasible" for Verizon to interconnect on shared loop facilities; (2) such interconnections are not "equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection" nor are they conducted in a manner that is "just, reasonable, and nondiscriminatory" in that it results in the "time within which the incumbent LEC provides such interconnection" being considerably greater for CLECs and their customers than it is for Verizon and its customers.

8. Verizon was unable to carry both its burden of demonstrating that interconnection at the point requested by North County was not technically feasible, as well as its burden of demonstrating that is claims of adverse network reliability were supported by evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts . Findings of Fact Nos. 11-26.

9. Verizon has and is violating West Virginia Code § 24-2-7 in that its refusal to permit CLECs to offer a 555 service on the same "rates, terms, and conditions" as Verizon offers its 555 service is a practice, act or services which is unjust, unreasonable, insufficient or unjustly discriminatory, as well as being a service which is demanded but cannot be reasonably obtained. Verizon: (1) did not and has not developed a plan to reconfigure the routing of 555 calls to permit such calls to be routed to CLECs, thereby effectively refusing to route such calls to CLECs; (2) insists on charging callers to a CLEC customer's 555 number message units, whereas callers to a Verizon customer's 555 number would not be subject to local message units; (3) insists on treating calls to a CLEC customer's 555 number as toll calls, whereas calls to a Verizon customer's 555 number would be local; (4) refuses to route calls over the interconnection trunk from CLEC customers to 555 numbers. Findings of Fact Nos. 27-31.

10. Verizon has and is violating the terms of its Tariff No. 201 and section 12 of the ICA, in that its conduct in dealing with NCC, and this Commission, both before and during the litigation was conducted with gross negligence, willful misconduct, in bad faith, vexatiously, wantonly, or for oppressive reasons. Findings of Fact Nos. 3-8, 12-13, 15-16, 19, 21, 23, 26. Verizon has not acknowledged to this Commission that it has in the past maintained a policy and practice of requiring separate dedicated IOF facilities for CLECs. Findings of Fact No. 21. Verizon's representations to this

Commission that it did not have such a policy or practice, in light *of* the overwhelming evidence to the contrary presented by North County, which was only buttressed by Verizon's far less than credible denials of such a policy or practice, is profoundly troubling to this Commission in terms of what it portends for Verizon's future conduct toward CLECs and toward this tribunal. The Commission is under no inclination *to* overlook such a violation given Verizon's lack of candor toward this tribunal. It is expected that parties appearing before the Commission will provide characterizations and explanations of facts which are consistent with the interest of the party making such representations, however the Commission expects and demands that such attempts at spinning the facts will stop short of fabrications and *posf hoc* creation of facts.

EXHIBIT C

EXHIBIT C

BEFORE THE
PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

NORTH C O U N N COMMUNICATIONS CORPORATION,

Complainant,

v. CASE NO. 02-0254-T-C

VERIZON WEST VIRGINIA, INC.,

Respondent

REPLY BRIEF **OF NORTH COUNTY COMMUNICATIONS CORPORATION**

Comes now North County Communications Corporation ('Complainant" or "NCC"), by counsel, and hereby tenders for the Commission's consideration its Reply Brief.

I.

INTRODUCTION

In what must be viewed as Verizon's most curious litigation posture to date, Verizon appears to suggest that the present interconnection agreement ("ICA") with NCC immunizes it from the full force of its regulatory and statutory obligations. Verizon Initial Brief, 10-13. The notion that this Cornmission cannot bring state law to bear against Verizon is particularly odd, given this Commission's longstanding role as a watchdog for West Virginia consumers. The hearing provided this Commission with an opportunity to witness how Verizon brought its corporate arrogance to bear by

attempting to compel CLECs to kowtow to Verizon's "policies," in total disregard for state and federal statutes, rules, regulations and decisions.

NCC will reserve its comments in this reply brief to demonstrating that Verizon remains subject to the full panoply *of* statutory and regulatory authority at this Commission's disposal in this proceeding. In particular: (1) even if accepted in the abstract, Verizon's argument that the ICA displaces other legal standards, as applied to this ICA, is truly a distinction without a difference because this ICA explicitly incorporates state and federal law; (2) the ICA does not displace state legal standards, as the Telecommunications Act of 1996 specifically allows for the application of state law; (3) to the extent an ICA can collapse federal legal standards, that only applies to negotiated ICAs, unlike this arbitrated ICA; and **(4)** Verizon's reliance on *Trinko*[1] is altogether misplaced as that case is readily distinguishable from this matter. Because the ICA incorporates by reference state and federal law, which in themselves are somewhat redundant, NCC's allegations *of* statutory and regulatoryviolations by Verizon also implicates violations by Verizon of the ICA. NCC refers the Commission to pages 18-35 of Staffs compelling initial brief, which demonstrates conclusively NCC's compliance and Verizon's failure to comply with the ICA.[2]

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[1] The core of Verizon's new defense comes from dictum found in the out-of-circuit authority in Law *Offices of Curtis V.* Tnnko, L.L.P. *v. Bell Atlantic Carp.,* 305 F.3d 89 (2d Cir. 2002), decided June 20th of this year. Verizon uses *Trinko* to suggest that once the Commission approves an ICA, its hands are tied and it can do nothing to ensure that an ILEC's behavior comports with state and federal regulatory or legal authority. *Trinko*, a civil action for damages brought against Verizon by *customers* of a Verizon competitor, offers Verizon no assistance here.

[2] *To* the extent that Verizon may actually be asserting some sort *of* alleged pleading deficiency as the basis for its position, the Commission has long applied the doctrine *of* liberal construction of pleadings.

II.

VERIZON AGREED TO BE BOUND BY WEST VIRGINIA'S STATE LAW AND REGULATORY AUTHORITY

NCC invites the Cornmission to consider the following passages from the ICA which demonstrate that the Commission's application of the full panoply of state and federal regulatory and statutory authority is wholly consistent with the ICA which the Commission approved.:

From the Preamble of the ICA:

"WHEREAS, the Parties intend the rates, terms, and conditions of this Agreement, *and their performance of obligations thereunder, to comply with the Act, the Rules and Regulations of the FCC, and the orders, rules and regulations of the* West *Virginia Public Service Commission (the "Commission")* . . ."

From Section 6–Compliance with Laws:

"6.1 Each party shall perform terms, conditions and operations under this Agreement *in a manner that complies with all Applicable Law*[3]*, including all regulations and judicial or regulatory decisions of all duly constituted governmental authorities of competent jurisdiction.* . ."

From Section 7–Governing Law

Commission Order, Case No. 57-1210-T-PC (January 13, 1558) at 8. The issues litigated at hearing were clearly recognized by all the participants.

[3] Per Part B of the ICA. "Applicable Law" means all applicable laws and government regulations and orders, including, but not limited to, the regulations and orders *of* the FCC and the West Virginia Public Service Commission

"The validity of this Agreement, the construction and enforcement *of* its terms, and *the interpretation of the rights and duties of the Parties, shall be governed by the Act and the laws of the State of West Virginia . . .*"

From Section 16–Remedies

"16.4 . . . [A]ll . . . remedies prescribed in this Agreement, or otherwise available, are cumulative and are *not intended to be exclusive of other remedies to which the injured party may be entitled at law or equity.*"

And in Section 42–Good Faith Performance[4]:

"42.1 In the performance of their obligations under this Agreement, the Parties shall cooperate fully and act *in good faith and consistently with the intent of the Act.*"[5]

It is quite apparent that the parties in the ICA, and the Commission in approving the ICA, did not intend that the relationship between Verizon and NCC would be governed without regard to the Act, FCC regulations, the Commission's rules, or West Virginia law, but rather, quite the opposite.[6] Nowhere in the ICA does it

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[4] Verizon relies upon this section as the basis for its counterclaim

[5] As Staff pointed out in the opening of its initial brief, Congress intended to encourage new entrants, with new services and new ideas about how to provide those services, to enter the local market–with the idea that this would **be** good for consumers. ***A J & J v. Iowa*** Utilities *Board,* 525 U.S. 366, 371, 119 S. Ct. 721, 726 (1999). Congress did not intend that the local monopolist should dictate to new entrants how they would do business.

[6] Should this Commission accept Verizon's argument that the **ICA** collapses other legal standards, which NCC believes would be a mistake for the reasons **set** forth herein, that argument would not insulate Verizon from accountability according to state and federal legal standards for its initial, pre-contract filing behavior. *At* page 2, paragraph 2 of the September 6, 2000 correspondence from Mr. Massoner *of* Verizon to Mr. Klein, NCC's attorney, the ICA opt-in letter indicates that the agreement shall become effective on the date of the filing with the Commission. NCC Ex. 3-B. The record indicates this event did not occur until January 19, 2001. Verizon quotes from the *Trinko* decision at footnote 27 of its initial brief: "*Once* the ILEC "fulfill[s] the duties" enumerated in subsections (b) and (c) by entering into an interconnection agreement

say that the parties have entered into the ICA without regard to the standards set forth in 47 U.S.C. § 251 (b, c), or that NCC has waived any statutory *or* regulatory protections. Verizon offers no citation to any such provision and has offered no evidence *to* suggest any such waiver by NCC.

III.

THE ICA DOES NOT DISPLACE ALL OTHER LEGAL STANDARDS

The Commission is not being asked to impose state law requirements which conflict with the ICA, but rather is applying state law consistent with, and in many instances identical to, that which is contained in and incorporated by reference into the ICA. The *Trinko* decision emphasized that its discussion was limited to § 251 of the Telecommunications Act and did not address other provisions *of* the Act. 305 F.3d at 105, n. 10. Numerous other provisions of the Act uphold state authority when addressing the activities of telecommunications carriers:

Section 252 (e) (3), Preservation of Authority, states "[n]otwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its

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in accordance with section 252 . . ., it is *then* regulated directly by the interconnection agreement." In other *words,* in the unlikely event the Commission accepted the premise behind the *Trinko* decision, it plainly has no application to an ILEC's duties *prior* to the agreement being duly entered by the parties and no application to the shenanigans Verizon put NCC through. The decision itself explicitly stressed it had no application where there was no interconnection agreement in effect. 305 F.3d at 105, n. 10.

review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."

Section 252.(f) (2), State Commission Review, states "[e]xcept as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review *of* [statements *of* generally available terms], including requiring compliance with intrastate telecommunications service quality standards or requirements."

Section 253 (b), State Regulatory Authority, states "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis . . . requirements necessary to . . . safeguard the rights of consumers."

Section 261 (b), Existing State Regulations, provides "[n]othing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the [Act], or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part."

Section 261 (c), Additional State Requirements, reads "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the requirements are not inconsistent with this part of the [FCC's] regulations to implement this part."

It is clear from these numerous citations that the Act did not seek to nullify state law once a party entered into an ICA.

IV.

THE PARTIES ARE BOUND BY § 251 UNDER THE ICA.

Verizon argues that the parties' ICA need not necessarily reiterate the duties in 47 U.S.C. § 251, but rather, the parties may enter into an ICA without regard to the standards set forth in 47 U.S.C. § 251 (b, c). Verizon Initial Brief, 11. This option is only available for voluntarily negotiated agreements, 47 U.S.C. § 252 (a) (1). The MCI agreement which NCC opted into was an arbitrated agreement, and as such, cannot eviscerate the applicability of § 251 to the parties to the ICA. NCC Ex. 3-B.[7] Additionally, as noted previously, the ICA's incorporation by reference of federal law separately defeats Verizon's contention.

The Commission recognized the distinct legal consequences which flow from negotiated and arbitrated agreements in Case No. 97-1210-T-PC (Commission Order, October 2, 1998), at 4-6, where this Commission determined that the interconnection agreement between Bell Atlantic and MCI was adopted by arbitration, and as a result, § 251 of the Act and the corresponding FCC regulations applied. This is reflected in the ICA itself at Section 24.2:

> The Parties acknowledge that the terms of this Agreement were established pursuant to an order of the Commission. *Any* and all *of* the terms of this Agreement may be altered or abrogated by *a* successful challenge to the Agreement (or to the order approving the Agreement) *as* permitted by Applicable Law. By signing this

[7] Mr. Massoner's correspondence contained in NCC **Ex.** 3-B erroneously cites the order approving the MCI agreement as from Case No. 97-1219-T-PC. The correct case number is 97-1210-T-PC. Mr. Massoner's description of an arbitrated agreement subject to the Commission's order is otherwise correct.

> Agreement, the Parties do not waive the right to pursue such a challenge.

The notion that the agreement is immutably cast in stone, either in its interpretation or its enforcement, cannot be sustained. This Commission must be afforded the opportunity to pass on Verizon's conduct in its day-to-day affairs in order to vindicate its jurisdiction over public utilities in this state in the interests *of* the consuming public.

V.

THE *TRINKO* DECISION IS DISTINGUISHABLE.

In the *Trinko* decision relied upon by Verizon, the plaintiff subscribed for local phone service from AT&T. AT&T had an interconnection agreement with Verizon. That agreement established a dispute resolution process as the exclusive remedy for all disputes between AT&T and Verizon arising out of the agreement or its breach. Shortly afler entering into the agreement, AT&T filed complaints alleging "lost and delayed orders." Through a consent decree Verizon resolved the dispute by agreeing to pay the United States $ 3 million and AT&T and others another $ 10 million.

Shortly afler the consent decree was announced, the plaintiff, an AT&T customer, sued Verizon, alleging Verizon was not affording CLECs equal access *to* its network. Plaintiff claimed that a result it received poor phone service and thus was damaged. In addition, the plaintiff alleged Verizon had no valid business reason

for its conduct and was intending to exclude competition from the market by making it difficult for CLECs to provide service on the level that Verizon is able to provide service to its customer.

The plaintiff alleged that Verizon violated its duties under § 251 (b) and (c) of the Act.[8] The court concluded that, at best, the plaintiffs § 251 claim only described conduct by Verizon that violated the interconnection agreement, but not the Act itself. As a result, when the consent decree eliminated the dispute between AT&T and Verizon per the exclusive remedies provision of the dispute resolution process, it also eliminated any claim *of* right under § 251 accruing to the plaintiff. As an out-of-circuit dispute, between an ILEC and a customer of a CLEC, with distinct facts from those presented to the Commission in this case, *Trinko* is neither binding nor persuasive.

VII.

CONCLUSION

Based upon the foregoing, complainant NORTH COUNTY COMMUNICATIONS CORPORATION respectfully submits that the Commission should rule in its favor on all issues in controversy and issue findings of fact and conclusion of law consistent therewith, as previously submitted by NCC.

[a] The plaintiff alleged other theories, as well, which are not germane to the present discussion.

Respectfully **submitted,**

NORTH COUNTY COMMUNICATIONS CORPORATION,

By Counsel

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CERTIFICATE OF SERVICE

I, James V. Kelsh, counsel for North County Communications Corporation, do hereby certify that a copy of the foregoing Reply Brief of North County Communications Corporation has been served upon the following counsel of record this 10th day of December, 2002, in the manner so indicated:

VIA HAND DELIVERY:

Patrick Pearlman, Esquire
Legal Division
Public Service Commission
201 Brooks Street
Charleston, West Virginia 25323

VIA FIRST CLASS U.S. MAIL, POSTAGE PREPAID:

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JAMES V. KELSH

EXHIBIT D

EXHIBIT D

BEFORE THE
PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

CASE NO. 02-0809-T-P

VERIZON WEST VIRGINIA, INC.
In the Matter of the Inquiry Into
Verizon West Virginia, Inc.'s
Compliance with the Conditions Set
Forth in 47 U.S.C. §271(c)

INITIAL BRIEF OF
NORTH COUNTY COMMUNICATIONS CORP.
IN SUPPORT OF
PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW